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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1488

VINCENT PACELLI, JR.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In the

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1973

No.

VINCENT PACELLI, JR.
Petitioner

v.

UNITED STATES OF AMERICA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Vincent Pacelli, Jr., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on January 11, 1974.

OPINION BELOW

The opinion of the Court of Appeals appears in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on January 11, 1974. Mr. Justice Marshall granted an extension of time in which to file this petition to and including April 7, 1974. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1). Although the court below reversed the conviction and ordered a new trial, it is clear that this Court has jurisdiction to review the refusal to order a dismissal or a judgment of acquittal. *Land. v. Dollar,* 330 U.S. 731, 734, n. 2; *United States v. General Motors Corp.,* 323 U.S. 373, 377.

QUESTIONS PRESENTED

1. *Whether* 18 *U.S.C.* §241 *of Title* 13 (*Civil Rights*) *applies to conspiracies to injure, intimidate or kill a prospective witness in a federal criminal prosecution.*

2. *Whether one can be convicted of a conspiracy to deny civil rights without proof that* (*a*) *the alleged co-conspirator knew of and shared the purpose of abridging the civil rights, or* (*b*) *that the alleged co-conspirator knew that the objective was a deprivation of protected legal rights, or* (*c*) *that the rights involved were "specific and definite."*

STATUTES INVOLVED

18 United States Code, Chapter 13 *Civil Rights*

§241. Conspiracy against rights of citizens

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured —

They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term or years or for life.
As amended April 11, 1968; Pub. L. 90-284, §103(a), 82 Stat. 75.

§245. Federally protected activities

(a) (1) Nothing in this section shall be construed as indicating an intent on the part of Congress to prevent any State, any possession or Commonwealth of the United States, or the District of Columbia, from exercising jurisdiction over any offense over which it would have jurisdiction in the absence of this section, nor shall anything in this section be construed as depriving State and local law enforcement authorities of responsibility for prosecuting acts that may be violations of this section and that are violations of State and local law. No prosecution of any offense described in this section shall be undertaken by the United States except upon the certification in writing of the Attorney General or the Deputy Attorney General that in his judgment a prosecution by the United States is in the public interest and necessary to secure substantial justice, which function of certification may not be delegated.

(2) Nothing in this subsection shall be construed to limit the authority of Federal officers, or a Federal grand jury, to investigate possible violations of this section.

(b) Whoever, whether or not acting under color of law, by force or threat or force willfully injures,

intimidates or interferes with, or attempts to injure, intimidate or interfere with—

(A) voting or qualifying to vote, qualifying or campaigning as a candidate for elective office, or qualifying or acting as a poll watcher, or any legally authorized election official, in any primary, special, or general election;

(B) participating in or enjoying any benefit, service, privilege, program, facility, or activity provided or administered by the United States;

(C) applying for or enjoying employment, or any perquisite thereof, by any agency of the United States;

(D) serving, or attending upon any court in connection with possible service, as a grand or petit juror in any court of the United States;

(E) participating in or enjoying the benefits of any program or activity receiving Federal financial assistance; or

(2) any person because of his race, color, religion or national origin and because he is or has been—

(A) enrolling in or attending any public school or public college;

(B) participating in or enjoying any benefit, service, privilege, program, facility or activity provided or administered by any State or subdivision thereof;

(C) applying for or enjoying employment, or any perquisite thereof, by any private employer or any agency of any State or subdivision thereof, or joining or using the services or advantages of any labor organization, hiring hall, or employment agency;

(D) serving, or attending upon any court of any State in connection with possible service, as a grand or petit juror;

(E) traveling in or using any facility of interstate commerce, or using any vehicle, terminal, or facility of any common carrier by motor, rail, water, or air;

(F) enjoying the goods, services, facilities, privileges, advantages, or accommodations of any inn, hotel, motel, or other establishment which provides lodging to transient guests, or of any restaurant, cafeteria, lunchroom, lunch counter, soda fountain, or other facility which serves the public and which is principally engaged in selling food or beverages for consumption on the premises, or of any gasoline station, or of any motion picture house, theater, concert hall, sports arena, stadium, or any other place of exhibition or entertainment which serves the public, or of any other establishment which serves the public and (i) which is located within the premises of any of the aforesaid establishments or within the premises of which is physically located any of the aforesaid establishments, and (ii) which holds itself out as serving patrons of such establishments; or

(3) during or incident to a riot or civil disorder, any person engaged in a business in commerce or affecting commerce, including, but not limited to, any person engaged in a business which sells or offers for sale to interstate travelers a substantial portion of the articles, commodities, or services which it sells or where a substantial portion of the articles or commodities which it sells or offers for sale have moved in commerce; or

(4) any person because he is or has been, or

in order to intimidate such person or any other person or any class of persons from—

(A) participating, without discrimination on account of race, color, religion or national origin, in any of the benefits or activities described in subparagraphs (2) (A) through (2) (F); or

(B) affording another person or class of persons opportunity or protection to so participate; or

(5) any citizen because he is or has been, or in order to intimidate such citizen or any other citizen from lawfully aiding or encouraging other persons to participate, without discrimination on account of race, color, religion or national origin, in any of the benefits or actvities described in subparagraphs (1) (A) through (1) (E) or subparagraphs (2) (A) through (2) (F), or participating lawfully in speech or peaceful assembly opposing any denial of the opportunity to so participate—

shall be fined not more than $1,000, or imprisoned not more than one year, or both; and if bodily injury results shall be fined not more than $10,000, or imprisoned not more than ten years, or both; and if death results shall be subject to imprisonment for any term of years or for life. As used in this section, the term "participating lawfully in speech or peaceful assembly" shall not mean the aiding, abetting, or inciting of other persons to riot or to commit any act of physical violence upon any individual or against any real or personal property in furtherance of a riot. Nothing in subparagraph (2) (F) or (4) (A) of this subsection shall apply to the proprietor of any establishment which provides lodging to transient guests, or to any employee acting on behalf of such proprietor, with respect to the enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of such establishment if such establishment is located within a building which con-

tains not more than five rooms for rent or hire and which is actually occupied by the proprietor as his residence.

(c) Nothing in this section shall be construed so as deter any law enforcement officer from lawfully carrying out the duties of his office; and no law enforcement officer shall be considered to be in violation of this section for lawfully carrying out the duties of his office or lawfully enforcing ordinances and laws of the United States, the District of Columbia, any of the several States, or any political subdivision of a State. For purposes of the preceding sentence, the term "law enforcement officer" means any officer of the United States, the District of Columbia, a State, or political subdivision of a State, who is empowered by law to conduct investigations of, or make arrests because of, offenses against the United States, the District of Columbia, a State, or a political subdivision of a State. Added Pub. L. 90-284, §101(a), April 11, 1968, 82 Stat. 73.

STATEMENT OF THE CASE

Petitioner was tried as the sole defendant in a two-count indictment in the Southern District of New York. Count one charged that petitioner and one Barry Lipsky conspired in February, 1972 to deprive Patsy Parks of her civil rights in violation of 18 U.S.C. §241, and that the conspiracy caused Parks' death. Count two alleged a violation of 18 U.S.C. §1503 in that defendant on or about February 4, 1972, by threats and force, impeded and injured Parks on account of her having been a grand jury witness and her being a prospective witness for the Government in a criminal case then pending against the defendant.

A four-day trial before a jury resulted in defendant's conviction on both counts. On June 1, 1973, the District Judge imposed the maximum sentence on count one, life in prison, and also imposed a concurrent five-year sentence on count two.

The Government's case consisted substantially of the testimony of the alleged co-conspirator, Lipsky, who testified that Patsy Parks came to him in a bar, asked him to put her in touch with petitioner. She explained that agents had tried to subpoena her earlier in the evening and she wanted to ask petitioner's advice.[1] According to Lipsky, he told Parks to wait for him and he took a cab to petitioner's house. He got petitioner out of bed, reported what Parks had said. Petitioner replied, "I know what I have to do" (T. 77), and the two of them drove back to Manhattan. On the way, they stopped and bought four cans of gasoline. Lipsky then fetched Parks from the bar and

[1] In fact, federal agents had unsuccessfully sought to serve a subpoena on Miss Parks. The subpoena required her testimony in a forthcoming federal narcotics trial in which petitioner was a defendant.

the three drove to Long Island. They drove around for about an hour, petitioner and Parks discussing the subpoena. At one point, petitioner offered Parks money to leave town, according to Lipsky (T. 81). Subsequently, petitioner stopped the car, went to a phone booth and appeared to be making a call (T. 82). When he returned, he said he was tired and asked Lipsky to drive.

Petitioner got in the back seat, with Lipsky and Parks in the front. Shortly thereafter, petitioner stuck Parks in the neck with a knife, then stabbed her about a dozen times in the chest (T .84). Lipsky and petitioner then drove to a wooded area, where petitioner removed Parks' body. Lipsky removed the gasoline from the car, petitioner poured it over Parks' body (T. 85). Lipsky lit a match and dropped it on the gasoline (T. 86). Flames flared up ten to fifteen feet high (T. 158).

The two men then drove back to petitioner's apartment, destroying evidence along the way. They cleaned the car when they got home, then went to sleep (T. 91).

Parks' charred body was found several days later.

Petitioner's principal defense at trial was that Lipsky had murdered Parks himself, alone or with an unidentified person, and petitioner had nothing to do with the matter.

On appeal, petitioner claimed *inter alia*, that 18 U.S.C. §241 does not apply to conspiracies to impede or injure a witness and that, in any event, the requisite conspiracy had not been proved. The Court of Appeals rejected these claims but reversed for a new trial because the trial judge had improperly admitted hearsay and the Government had breached its obligations to turn over 18 U.S.C. §3500 material.

REASONS FOR GRANTING THE WRIT

1. *The decision below erroneously construes the Civil Rights Act and destroys the efforts of the 90th Congress to clarify it.*

18 U.S.C. §241 makes criminal a conspiracy to "injure . . . any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States . . ." The right specified in the indictment herein was the "right and privilege to give information to the proper authorities concerning violations of the narcotics laws of the United States." Section 241, however, does not encompass conspiracies to injure Government witnesses. If any right was infringed by the conspiracy charged in the indictment, it was the right of the Federal Government to obtain the testimony of witnesses, a right which is not within §241, but rather, 18 U.S.C. §1503, which was the basis of count 2 of the indictment.

Prior to the amendment of §241 in 1968, there was uncertainty about the applicability of §241 to conspiracies to injure or intimidate witnesses. The Court had held, late in the 19th Century, that the predecessor of §241 covered a conspiracy to injure a citizen on account of his having informed a federal marshal that defendants were violating federal liquor laws:

> "The right of the private citizen who assists in putting in motion the course of justice, and the right of the officers concerned in the administration of justice, stand on the same ground, just as do the rights of citizens voting and of officers elected . . ."

In re Quarles and Butler, 158 U.S. 532, 536 (1895). There was a *dictum* to the same effect in *Motes v. United States,* 178 U.S. 458 (1900). Petitioner has found only one case, however, in which the right to *testify,* as opposed to the right to "put in

motion the course of justice," (*In re Quarles and Butler, supra*) was held to be within §241, and in that case its appears that the potential witness was also a party litigant. *Foss v. United States,* 266 F. 881 (9th Cir. 1920). Proffering information about law violations is analogous to the right to vote, to petition the Government, or to make a speech, but a citizen has no right to testify in a trial on behalf of the Government in the same sense in which he has a right to provide information or complain about law violations. No citizen has standing to complain if the Government or the court refuses to call him as a witness, he can sue no one, he has not been injured. To call his potentiality as a witness a "right or privilege secured to him by the Constitution or laws of the United States," is to stretch those words beyond their already bloated compass.

Moreover, the view of the court below was rejected in a carefully reasoned opinion by Justice Lamar. In *United States v. Sanges,* 48 F. 78 (C.C.Ca. 1891), writ of error dismissed, 144 U.S. 310 (1892), Justice Lamar dismissed an indictment which charged the defendants under the predecessor of §241 with having conspired to injure and kill a citizen for having testified before a federal grand jury. Holding that the section did not apply to federal witnesses, the court noted that the primary purpose of the statute when originally enacted in 1870 (16 Stat. 141) was to protect the right to vote and that the Attorney General of the United States, in his 1890 report, had declared the provision inapplicable to federal witnesses. The court also noted that a specific statute (17 Stat. 13) had been enacted in 1871 to cover conspiracies to intimidate or injure federal witnesses and that this statute (predecessor of §1503) described the offense in express terms and prescribed "a punishment entirely different." The court went on to note:

> The status of a witness in a court, pending either a civil or criminal proceeding, is in law regarded as one of obligation and duty, which he is compelled to perform, or of a function which he is obliged to discharge, rather than a right on his part which he may or may not exercise, according to his own will. The right, in relation to his testimony, is the right of the parties litigant, or of the government as the case may be, to have it taken; not his own, either to offer or withhold. They are entitled to the process of the court to compel his attendance, and if he attends, to compel him to testify, even against his will, to the whole truth, and nothing but the truth.
>
> With respect to the prosecution for a crime pending in a federal court, or in a United States grand jury, the right is a public right, i.e., the right of the United States to have its winesses and their testimony, and to have them protected in going to and returning from the court. The wrong punished in such cases is a public wrong, and its correlative is a public right.
>
> *United States v. Sanges, supra,* 48 Fed. at 84.

The matter was never clarified by court decision prior to 1968. Confusion over the scope of §241 continued. See. *e.g. United States v. Guest,* 383 U.S. 745 (1966); *United States v. Price et al,* 383 U.S. 787 (1966). It was with this background that the 90th Congress in 1968 enacted several amendments to Chapter 13, United States Code, to clarify the scope of federally protected civil rights. In P.L. 90-284, 18 U.S.C. §245 was added to Chapter 13, and the penalty provision of §241 was amended to change the penalty from $5,000 fine or ten years in prison (18 U.S.C. §241, 1964 ed.) to its present form, increasing the fine to $10,000 and authorizing a life sentence "if death results." P.L. 90-284, 82 Stat. 73, U.S. Code Cong. and Admin.

News, Vol. 1, p. 89. The legislative history of these amendments clearly indicates that Congress intended to confine the scope of §241 to the "Federally protected activities" specifically enumerated in the new section §245. And although the activities specified in §245 are extensive, there is nothing in that section concerning the right to be a witness.

The purpose of the legislation, insofar as it relates to §241, is clearly set forth in the Senate Report (Senate Report No. 721, U.S. Code Cong. and Admin. News, 90th Cong. 2d Sess. 1968, p. 1837, 1838):

> Several criminal and civil statutes designed to reach both private and official interference with Federal rights were enacted by Congress in the 1860's and early 1870's. This legislation included the statutory predecessors of what are now sections 241 and 242 of the Federal Criminal Code. A number of these early provisions, however, were invalidated or greatly restricted in application by the courts; others were repealed by later Congresses.
>
> Only recently the Supreme Court had occasion to interpret two of the still existing criminal provisions — sections 241 and 242. In *United States v. Guest,* the Court was faced with a Federal indictment based on the shooting of a Negro educator, Lemuel Penn, while he was driving through the State of Georgia; *United States v. Price* involved the 1964 killings of the three civil rights workers in Neshoba County, Miss.
>
> While Supreme Court decisions in these cases clarify some aspects of sections 241 and 242, the opinion of the Court and the separate opinions of Justices Clark Brennan in the *Guest* case point up a number of serious deficiencies in both statutes and suggest how they might be overcome.

* * *

And because these statutes do not spell out clearly what kinds of conduct are prohibited, they lack the deterrent effect that would result from plainly worded prohibitions. Commenting on the vague language of section 241, Justice Brennan said last year in *United States v. Guest*, 86 S. Ct. 1170, 383 U.S. 745, 786, 16 L.Ed. 2d 239.

> * * * since the limitation on the statute's effectiveness derives from Congress' failure to define — with any measure of specificity — the rights encompassed, the remedy is for Congress to write a law without this defect. To paraphrase my Brother Douglas' observations in *Screws v. United States*, 65 S. Ct. 1031, 325 U.S. at 105, 89 L.Ed. 1495, addressed to a companion statute with the same shortcoming, if Congress desires to give the statute more scope, it may find ways of doing so.

H.R. 2516 meets this need by spelling out the kinds of activity to be protected, and the bill provides an effective means of deterring and punishing forcible interference with the exercise of Federal rights. The clear language of the bill would avoid unnecessary litigation concerning coverage and would provide unmistakable warning to lawless elements not to interfere with any of these activities.

Finally, there are two other significant defects in the present laws which H.R. 2516 would remedy. First, section 241 applies only to conspiracies. Thus, even with respect to conduct held to be within the scope of section 241, a prosecution may not be brought for action by a single individual unless in some way another person has been involved. Second, the maximum penalties are inadequate for cases in which bodily injury or death has occurred. Section 241 provides a maximum penalty of a $5,000 fine or a 10-year prison sentence, or both. Under section 242, the maximum penalty is

only a $1,000 fine or one year's imprisonment, or both.

H.R. 2516 would prohibit forcible interference with any one of the specified activities by individuals acting alone as well as by public officers or other persons acting under color of law.

* * *

Congress was plainly responding to Mr. Justice Brennan's invitation to give §241 a "more definite scope" by specifying, in §245, the rights protected by §241. That the purpose of the amendments was to exclude from §241's coverage the acts involved in the present indictment is fortified by the fact that a substitute for the original bill, H.R. 2516, which was proposed by the Subcommittee on Constitutional Rights, was rejected by the Judiciary Committee. U.S. Code Cong. and Admin. News, *supra,* p. 1838. The rejected bill had specifically enumerated four rights not included in the bill which became law. *One of them was the right to inform on violations of Federal Criminal Law.* See *Id.* at 1860 (Views of Senator Ervin).

The proponents of the rejected subcommittee bill urged its passage and expanded on their arguments in Senate floor debate, while the sponsors of H.R. 2516 argued that it was preferable to the Ervin amendment because it limited federal jurisdiction. Senator Hart, for example, supported H.R. 2516 because it "does respond to the comment of Justice Brennan. Its clear language will avoid unnecessary litigation concerning coverage. . . . [T]his legislation is more limited than that proposed by the substitute proposal. It represents a minimal, but necessary, Federal presence in the field of law enforcement. The bill which was recommended by the Constitutional Rights Subcommittee covered a more limited list of activities to be sure, but it would cover those activities in an excessively broad way be-

cause the bill leaves out the element requiring race, religion, or national origin to be a factor in the criminal conduct." Cong. Rec., Jan. 18, 1968, at 320.

This theme — that the Civil Rights statutes should be clarified and restricted and that both §241 and the Ervin proposal were overbroad — was echoed by other proponents of H.R. 2516, including Senator Tydings (Cong. Rec., Jan. 25, 1968, p. 1018); Senator Kennedy (Cong. Rec., Feb. 1, 1968, p. 1802; Feb. 5, 1968, p. 2084); and Senator Javits (Cong. Rec., Jan. 22, 1968, p. 533-535). It could hardly be clearer, therefore, that Congress, in P.L. 90-284, intended to exclude from the coverage of §241 and the newly enacted life penalty provision, conspiracies the object of which was other than those enumerated in §245. This is not to say, of course, that intimidation, injury or murder of federal witnesses is to go unpunished. 18 U.S.C. §1503 adequately protects the federal interest and, as the Senators argued, the crime of murder is preeminently a matter of state concern and state jurisdiction where it is not racially motivated. See remarks of Senator Hart, Cong. Rec. Jan. 19, 1968, p. 398; of Senator Javits, Cong. Rec. Jan. 22, 1968, p. 535.

The court below was of the view that if Congress in enacting §245 had intended to cover the whole ground, it would have expressly repealed §241. Yet §245 does not cover the entire ground of §241, even as petitioner construes it, for §241 punishes conspiracies whereas §245 encompasses persons who act singly in interfering with the specified federally protected rights. Surely, however, there is no basis for believing that the 90th Congress intended the scope of protected activities to vary depending on whether the activities were infringed by conspirators or persons acting singly.

Manifestly, where the 1968 legislation was expressly intended to clarify the "federally protected activities" rather than to effect an outright repeal, no canon of statutory construction requires a court to disregard the legislative history of H.R. 2516 and its implications for §241.

If the Government's theory of §241 reflected in the decision below were the law, there would be little need for any federal criminal legislation other than §241, at least where two or more persons act in concert and the victim is a citizen, for if §241 covers every conspiracy to injure, intimidate or oppress citizens from engaging in activity which they either have a right to engage in or in which there is a federal interest, it is hard to imagine an illegal activity which would not amount to a civil rights conspiracy. Until the present case, the Government seldom pressed such a theory.[8]

2. *The decision below deprives the concept of "conspiracy" of its essential meaning and conflicts with several decisions of this Court.*

Even if there is a "right" to be a witness in a federal criminal case and that "right" is "secured [to the citizen] by the Constitution or laws of the United States" within the meaning of §241, and Congress intended to punish under §241 conspiracies to injure, intimidate, or kill potential federal witnesses, the Government proved no such conspiracy.

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[8] Since the decision below, however, an expansive interpretation of § 241 was employed in the Second Circuit against labor leaders for interfering with the rights of union members not to participate in a concerted labor activity. A different panel of the court below ordered the indictment dismissed, although conceding that the union leaders' activities come within the literal language of § 241 in that they conspired to infringe rights protected by the Taft-Hartley Act. *United States v. DeLaurentis*, ... F. 2d ..... (2d Cir., Jan. 21, 1974). See also, *United States v. Berke Cake Co.*, 50 F. Supp. 311 (E.D.N.Y. 1943).

There was, first of all, no evidence that Miss Parks desired to testify or that, in any event, Lipsky was aware of such a desire on her part. She told her roommate on the night of the murder that "she did not want to testify in a public trial" (T. 44). She told Lipsky later that night that she had hidden in her bedroom to avoid a subpoena and wanted to see petitioner to " see if he would tell her what to do" (T. 73). It is absurd to suggest that Miss Parks was injured, intimidated, oppressed or threatened "in the free exercise or enjoyment" of a right which she manifestly did not want to exercise.

Assuming arguendo, however, that §241 is construed to cover conspiracies to prevent witnesses from testifying unwillingly and under compulsion (an anomalous form of "free exrecise"), there was no proof of a conspiracy with that as its objective. Lipsky's testimony, if believed, would permit the inference that he expected the girl to be killed and knowingly aided in the killing, but it clearly fails to establish that his purpose in rendering such assistance was to prevent Miss Parks from testifying. There is no testimony by Lipsky that he knew or understood *why* petitioner wanted to kill the girl prior to his rendering aid.

Whatever may be the case with other conspiracy statutes, a conspiracy under §241 requires that the purpose of the conspiracy must be to deprive the citizen of a right which by statute or case law has "been made specific and definite." *Screws v. United States*, 325 U.S. 91, 195 (1945). The specific purpose of the conspiracy must have been to deprive the victim of such a right. *Id.* at 107. In *United States v. Guest*, 383 U.S. 745 (1966), the Court said: "A specific intent to interfere with the federal right must be proved. . . . [A] conspiracy to rob an

interstate traveler would not, by itself, violate §241. But if the predominant purpose of the conspiracy is to impede or prevent the exercise of the right of interstate travel . . . the conspiracy becomes a proper object of federal law . . ." *Id.* at 760. Similarly, it is not enough that the Government proved a conspiracy to kill Miss Parks and that she was a potential witness. The Government had to prove that the "predominant purpose" of the conspiracy, *i.e.* of both conspirators, was, at the very least, to prevent her from testifying. The Government's proof does not permit the inference that *Lipsky* had such a purpose. Since there was no meeting of the minds on the proscribed object of the conspiracy, and there were only two potential conspirators, the prosecution fails. See LaFave and Scott, Handbook on Criminal Law (1972), p. 488, 470; Model Penal Code §5.03. Comment, p. 109 (Tent. Draft No. 10, 1960).

Finally, even if Lipsky and petitioner had been proved to have shared a purpose to dispose of Miss Parks to keep her from testifying, that would not be enough. There is no evidence that either Lipsky or petitioner knew that Miss Parks had a right to testify, for indeed, she did not.

Nor, given the case law on the matter, *e.g., United States v. Sanges, supra,* p. 11, was the right to testify as a witness for the Government a right of the witness which was made "specific and definite" by statute or case law at the time of the alleged conspiracy. The plain teaching of *Screws*, therefore, is that §241 does not apply to any conspiracy which the Government could conceivably have proved.

The decision below, therefore, virtually eliminates "conspiracy" as an element of the offense under §241, and makes an already vague statute unconstitutionally and unnecessarily overbroad.

Conclusion

For the foregoing reasons, petitioner's petition for a writ of certiorari should be granted and the decision of the court below should be reversed with directions to dismiss count 1 of the indictment or to enter a judgment of acquittal on that count.

Respectfully submitted,

STEVEN DUKE
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 368—September Term, 1973.

(Argued November 1, 1973 Decided January 11, 1974.)

Docket No. 73-2137

UNITED STATES OF AMERICA,

Appellee,

—against—

VINCENT PACELLI, JR.,

Defendant-Appellant.

Before:

MOORE, HAYS and MANSFIELD,

Circuit Judges.

Appeal from a judgment of conviction entered after a jury trial in the United States District Court for the Southern District of New York, Charles H. Tenney, *Judge,* for conspiracy to deprive a citizen of her civil rights, causing her death, in violation of 18 U.S.C. §241 (1972) and for injuring a witness in violation of 18 U.S.C. §1503 (1972).

Reversed and remanded for a new trial.

STEVEN B. DUKE, Esq., New Haven, Conn., *for Defendant-Appellant.*

PAUL J. CURRAN, United States Attorney, Southern District of New York (Arthur J. Vivi-

ani, Walter J. Higgins, Jr., Peter L. Truebner, John D. Gordan III, Assistant United States Attorneys, New York, N.Y., of counsel), *for Appellee.*

MANSFIELD, *Circuit Judge:*

Vincent Pacelli, Jr. appeals from a judgment of conviction in the Southern District of New York, following a jury trial before Judge Charles H. Tenney on both counts of an indictment charging that Pacelli (1) had violated 18 U.S.C. §241[1] (1972) by conspiring with Barry Lipsky and others unknown to deprive Patsy Parks of her right to be a witness at trial, causing her death, and (2) had violated 18 U.S.C. §1503[2] (1972) by using force to impede and injure

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1 "§241. *Conspiracy against rights of citizens*

"If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or

"If two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured—

"They shall be fined not more than $10,000 or imprisoned not more than ten years, or both; and if death results, they shall be subject to imprisonment for any term of years or for life."

2 "§1503. *Influencing or injuring officer, juror or witness generally*

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States magistrate or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on

Parks who had been a grand jury witness and who had been subpoenaed to be a witness for the government in a narcotics case, 71 Cr. 614, then pending against Pacelli.

Pacelli was sentenced to life imprisonment for the §241 offense and to a concurrent five-year term for the §1503 offense. Because the trial judge failed to exclude certain hearsay declarations offered to prove the belief of the declarants that Pacelli was guilty, and because the government failed to disclose to defense counsel certain statements made by its principal witness, Barry Lipsky, for use in cross-examining Lipsky, we reverse and remand for a new trial.

This case arises out of the brutal stabbing to death on February 4, 1972, of Patsy Parks whose body—which had been burned with gasoline flames—was found a few hours later by a police officer in a desolate area of Massapequa, Long Island. On the previous evening federal narcotics agents had attempted to serve a subpoena on Parks ordering her to appear as a witness at the trial of the indictment against Pacelli, which Judge Milton Pollack had scheduled to begin on February 8, 1972. Approximately nine months earlier, on May 27, 1971, Parks had testified before a federal grand jury in the Southern District of New York about a box which a friend told her contained money and which was delivered to Vincent Pacelli, Jr. Later the grand jury returned an indictment, 71 Cr. 614, against Pacelli and three others for violations of the federal narcotics laws.

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account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both."

On the evening of February 3, 1972, the federal agents seeking to serve the subpoena on Parks went to her Manhattan apartment, where they found her roommate, Patricia Quinn, who was told by them that they were looking for Parks in order to serve her with a subpoena. Upon learning shortly thereafter from Quinn of the attempted service, Parks went to a Manhattan discotheque, the Hippopotamus, where she approached Barry Lipsky, a friend of Pacelli, and told him she urgently wanted to see Pacelli about the subpoena.

Lipsky testified that he had been working for Pacelli since April 1971. After telling Parks to wait at the Hippopotamus he took a taxi to Pacelli's apartment at 501 Pelham Road, New Rochelle, New York, where he found Pacelli, his wife Beverly, Barbara Jalaba (Beverly's sister) and Al and Ida Bracer, who were close friends of Pacelli's. According to Lipsky, when he told Pacelli in the presence of the others that a girl named Patsy wanted to see him about a subpoena, Pacelli said: "That goddam box . . . I know it's about that goddam box. . . ." Lipsky quoted Pacelli as saying just before leaving with Lipsky to return to Manhattan, "I know what I have to do."

Lipsky testified that the following events then occurred. Pacelli and Lipsky drove Mrs. Pacelli's rented car back to Manhattan. On the way they stopped at a gasoline station where Lipsky purchased four one-gallon cans of gasoline which Pacelli said he needed "to burn up the girl's body." Arriving at the Hippopotamus at approximately 2:00 A.M., they picked up Parks and proceeded to head—with Pacelli driving—toward Massapequa, Long Island. During this drive Pacelli offered Parks money to go to "California or to Brazil" which Parks rejected since she said she had to stay in New York for her job and for her child.[3] When the

3 At the time of her death, Parks was separated from her husband. The couple had had one child.

car, after about an hour, reached Massapequa Lipsky took the wheel at the request of Pacelli, who shifted to the back seat. Almost immediately thereafter Pacelli stabbed Parks in the throat. Parks pleaded with Pacelli not to hurt her since she was a mother, but he said, "Die, you bitch," and stabbed her several more times in the throat until she was dead. Thereupon Pacelli told Lipsky to drive to a wooded area where they dumped Parks' body and Lipsky set it afire after Pacelli had poured the gasoline over it.

On the way back to New Rochelle, according to Lipsky's testimony, he and Pacelli stopped at a gas station where Lipsky threw the contents of Parks' pocketbook away after removing the money—$20—and then at a body of water about three blocks from Pacelli's apartment where Lipsky threw into the water the knife which had been used to murder Parks. Lipsky spent the night at Pacelli's apartment and awoke during the morning of the 4th to hear Pacelli's wife and sister-in-law complaining about the work they had to do to clean blood from the rented car. Later that day Pacelli, his wife and sister-in-law, Lipsky and another friend named Abbe Perez returned the rented car to an Econo-Car agency on Westchester Avenue in the Bronx. On the evening of February 5th, Lipsky had dinner with Pacelli at a Manhattan restaurant where Pacelli expressed satisfaction at having killed Parks since she would have testified against him at his upcoming trial for narcotics violations.

Pacelli and his co-defendants went to trial in the narcotics case before Judge Pollack on February 8th, and on February 10th Judge Pollack remanded Pacelli to jail when the prosecutor in the case advised him that Parks had been killed.

Of particular significance in the present case, in view of objections by defense counsel at trial, is Lipsky's testimony regarding statements made by certain friends and

relatives of Pacelli at a meeting on February 10th, immediately after Pacelli's demand, which Lipsky attended as the result of a phone call to his home from Beverly Jalaba, Pacelli's wife, who told him to meet her at the Manhattan apartment of Pacelli's uncle and aunt, Frank Antoinette Bassi. Lipsky was permitted to testify over objection that when he arrived at the Bassis' apartment Beverly took him aside and told him that Parks' body had been found and Pacelli had been put in jail. Also present at the apartment were Beverly's sister Barbara Jalaba, the Bassis, Pacelli's sister Loretta, Al Bracer, Abbe Perez, and a man named Bayron. Lipsky testified that "Frank Bassi was saying that there is a million places to put a body and you don't have to ... burn it up and leave it laying right out in the middle of nowhere for people to find." Lipsky testified further that Abbe Perez and Al Bracer took Lipsky aside and told him to go away for a while. Later that night, in the presence of Pacelli's wife, Perez gave Lipsky $1,000 for the trip.

The next day, February 11th, Lipsky went to Miami Beach, Florida. On February 16th, Al Bracer again rented the same car which Pacelli's group had returned to Econo-Car on February 4th. Two days later the car was found in flames in New Jersey but a chemical analysis was able to determine that traces of blood were present on the rug located on the right front passenger side of the car. On March 2, 1972, Lipsky was arrested by Nassau County authorities when he returned from Florida. He confessed that he had been present during the murder of Parks but insisted that Pacelli had actually carried out the murder. After his confession Lipsky was indicted for murder by the State of New York. On March 7, 1972, Pacelli's New Rochelle apartment was searched pursuant to a warrant and among the items seized were several coats similar to the one which Lipsky claimed Pacelli wore on the night of

the murder. One of these coats had traces of blood on it. On March 13, 1972, a knife was recovered from the water at the Cameron Boat Rental Company of New Rochelle, which was two blocks from Pacelli's apartment.

Shortly after his arrest by Nassau County authorities, Lipsky began talking with federal narcotics agents about Pacelli's narcotics operations. As a result three new indictments were returned against Pacelli: 72 Cr. 664 on June 5, 1972; 72 Cr. 1319 on December 4, 1972; 73 Cr. 441 on April 16, 1973. In June 1972 Pacelli was convicted on 72 Cr. 664 solely on Lipsky's testimony and in December 1972 Pacelli was tried on 72 Cr. 1319. During cross-examination of Lipsky, defense counsel produced tape recordings of conversations between Lipsky, his attorney, and members of the United States Attorney's staff, which occurred in March and April 1972, during which Lipsky was promised immunity on any and all matters concerning which he would provide evidence to the federal authorities. Since Lipsky had perjuriously denied in his testimony in the trial of both narcotics charges (72 Cr. 664, 72 Cr. 1319) that he had received any consideration for his testimony, the conviction in 72 Cr. 664 was vacated and a mistrial was declared in 72 Cr. 1319. A few days later, on December 22, 1972, Lipsky wrote a four-page letter to Robert Morvillo, who was then Chief of the Criminal Division in the United States Attorney's office for the Southern District of New York. In it he stated among other things that he was in a "terrible mental state" because of the mistrial he had caused, and declared that his "main purpose for the last 9½ months" was to "*try my very best* to assist the Government," and that he "*looked forward eagerly* to *testifying* in narcotics cases *for* the Government, *against* Vincent Pacelli Jr. and others." (Emphasis in original)

On January 15, 1973, Lipsky entered a plea of guilty to a reduced charge of manslaughter in Nassau County. When the plea was entered a letter from the United States Attorney's office for the Southern District of New York setting forth Lipsky's cooperation in federal narcotics investigations and his anticipated testimony against Pacelli in the present case was read to the judge who accepted the plea. Two weeks later, on January 31, 1973, the indictment leading to this appeal was returned against Pacelli. Trial of the indictment charging Pacelli with violating 18 U.S.C. §241 (1972) (Count I) and 18 U.S.C. §1503 (1972) (Count II) commenced on April 30, 1973, and on June 1, 1973, after the jury had on May 3, 1973, found Pacelli guilty as charged, Judge Tenney sentenced Pacelli to a term of life imprisonment on Count I and a term of five years to be served concurrently on Count II.

Discussion

On this appeal Pacelli argues that 18 U.S.C. §241 does not protect any federal right to be a witness at a trial and that if it does his conviction must be reversed since the trial court permitted the introduction of prejudicial hearsay when it allowed Lipsky to testify as to what Beverly Pacelli, Frank Bassi and others said to him at the Bassis' apartment on February 10, 1973. Furthermore, Pacelli claims he was denied the right to fully cross-examine Lipsky since the government did not disclose statements made by Lipsky to the federal narcotics agents and his letter to the United States Attorney and since the trial court would not permit defense counsel to fully explore the circumstances of Lipsky's confession to the Nassau County authorities or Lipsky's relationship and dealings with the United States Attorney's office. Pacelli also raises several other objections to the sufficiency of proof

under §241 and to the conduct of the trial court and of the government's prosecutor.

Scope of Section 241

Title 18 U.S.C. §241 protects the free exercise of rights "secured by the Constitution or laws of the United States." In deciding whether a right is so secured, it is not enough simply to scan the Constitution or laws to see whether the right is mentioned specifically. The Supreme Court has long made clear that certain rights are implicitly conferred by the Constitution's establishment of a national government intended to be "paramount and supreme within its sphere of action." *In re Quarles*, 158 U.S. 532 (1895); *Logan* v. *United States*, 144 U.S. (1892). One of these is the right to testify at a federal trial in response to a request or command of a federal district court. Our federal government has a particular interest in assuring a prospective witness that he or she will be free to respond by attending the trial of a federal indictment as a witness without being prevented from doing so by threats, molestation or force. Otherwise the foundations of federal justice would be undermined. In *Quarles* the Court, in holding that a citizen's right to inform federal authorities concerning violations of the internal revenue laws is secured by the Constitution even though it is not specifically mentioned in "any of the Amendments," stated that "[t]o leave to the several states the prosecution and punishment of conspiracies to oppress citizens of the United States, in performing the duty and exercising the right of assisting to uphold and enforce the laws of the United States would tend to defeat the independence and the supremacy of the national government." 158 U.S. 536-37. See also *Motes* v. *United States*, 178 U.S. 458 (1900); *Foss* v. *United States*, 266 Fed. 881 (9th Cir. 1920) (right to testify as a witness is secured by Constitution or laws

of the United States). This principle applies with equal force in the present case.

Appellant urges that even if the Constitution does secure to citizens a right to testify at federal criminal trials, Congress in 1968 responded to confusion over the scope of §241 by listing the Constitutional and statutory rights protected by the section. Congress did this, appellant contends, not by amending §241 in any significant respect but by enacting an entirely new section, 18 U.S.C. §245, which made it unlawful to interfere with a number of specifically listed "federally protected activities" including: voting, using government facilities, applying for employment with government agencies, serving as a petit or grand juror, and receiving federal financial assistance. Appellant says that Congress chose the extraordinary course of amendment by implication rather than outright repeal of §241.

It is well settled that repeals (or amendments) by implication are not favored and will be given effect only upon a clear showing of Congressional intent, such as where the two statutes at issue are in irrevocable conflict or the later act unquestionably covers the entire subject of the earlier one and is obivously designed as a substitute for it. See *Posadas* v. *First National City Bank,* 296 U.S. 497, 503 (1936). No such showing is made here. This is not a case like that cited to us by appellant, *United States* v. *Lovely,* 319 F.2d 673 (4th Cir.), *cert. denied,* 375 U.S. 913 (1963), where both laws covered identical subject matter: South Carolina's consent to the acquisition of its land by the United States for any public purpose and the procedures to be followed for the vesting of jurisdiction over the lands acquired in the United States. Here, in contrast, it is far from clear that §245 covers the identical subject matter as §241. Furthermore appellant concedes that §241 outlaws *conspiracies* to violate the free exercise of Constitutional

rights and privileges whereas §245 is limited to specifically enumerated *substantive offenses*, including those committed by a single person. Compare *Chase* v. *United States*, 256 U.S. 1 (1921) with *Gibson* v. *United States*, 194 U.S. 182 (1964).

In support of his amendment by implication theory, appellant relies upon Senate Report 721 issued by the Senate Committee on the Judiciary to accompany H.R. 2516, the bill which was ultimately turned into §245. See U.S. Code Cong. and Admin. News, 90th Cong., 2d Sess., 1837, 1838 (1968). Specifically we are directed to that portion of the Report which, after referring to Justice Brennan's suggestion in *United States* v. *Guest*, 383 U.S. 745, 786 (1966), that Congress might render §241 more effective by defining the rights encompassed by it with greater specificity, states:

> "H.R. 2516 meets this need by spelling out the kinds of activity to be protected, and the bill provides an effective means of deterring and punishing forcible interference with the exercise of Federal rights. The clear language of the bill would avoid unnecessary litigation concerning coverage and would provide unmistakable warning to lawless elements not to interfere with any of these activities."

However, if Congress had intended to restrict itself merely to defining and limiting the rights described in general terms in §241, it knew how to accomplish that objective. It would have simply enumerated the detailed rights in §241 itself, with appropriate restrictive language. Instead it chose to enact a separate law after receiving testimony to the effect that the proposed new statute ". . . parallels but does not supplant those existing federal criminal statutes [18 U.S.C. 241 and 242], and undertakes to cure some of their deficiencies." Hearings on S. 1026, etc., before the Subcommittee on Constitutional Rights of the U.S. Senate

Committee on the Judiciary, 90th Cong., 1st Sess. at 312 (1967). Nor was the failure expressly to limit or repeal §241 an oversight. Congress simultaneously amended that statute expressly to provide an increased penalty when death or bodily injury resulted from activities prohibited by the statute. It was well aware of the differing scopes of the two respective statutes.

The Congressional purpose in enacting §245 was not to repeal §241 but to remove any doubt as to the protection that would be extended against private interference with certain specific rights enumerated in §245. Neither the language nor the legislative history of the new statute indicates the slightest intention to strip the national government of its existing ability under §241 to protect such important interests as the right to remain in the official custody of a United States Marshal, *Logan* v. *United States*, 144 U.S. 263 (1892), to inform on violations of federal law, *In re Quarles*, 158 U.S. 532 (1895), to testify at proceedings held under authority of federal law, *Foss* v. *United States*, 266 Fed. 881 (9th Cir. 1920), to travel interstate to arrive at the seat of government, *United States* v. *Guest*, 383 U.S. 745 (1965), to assemble and petition the Congress for a redress of grievances, *United States* v. *Cruikshank*, 92 U.S. 542, 552 (1875). This would have been drastic action entirely unnecessary and unrelated to the principal purpose of the Committee, which was to draft a law effectively dealing with racial violence only.[4]

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4 When it first emerged from the Senate Committee on the Judiciary, H.R. 2516 applied only to deprivations of the listed federal rights which were racially motivated. See 113 Cong. Rec. 37117 (1967). It was subsequently amended after much acrimonious debate to prohibit deprivations of some federal rights which were nonracially as well as racially motivated. See 114 Cong. Rec. 4570-71 (1968).

Appellant notes that the majority of the Senate Committee on the Judiciary rejected an alternative to H.R. 2516 proposed by Senator Ervin which would have included four enumerated rights not included

In short, we find no basis in the new statute or in its history warranting a departure from the rule against amendments by implication. Indeed it would have been an extraordinary step for Congress to repeal a 100-year old generic statute which "from original enactment through subsequent codifications was intended to deal . . . with 'conspiracies to interfere with Federal rights and with all Federal rights.'" See *Price* v. *United States*, 383 U.S. 787, 801-05 (1965).

Pacelli further argues that, even assuming the applicability of §241, the government failed to prove a violation because Parks did not want to testify. This contention borders on the frivolous. It was her unwillingness to depart from the jurisdiction and Pacelli's own statement that "she was set to testify against him at trial" that provided his motive for his killing her.

Admission of Hearsay Evidence

Appellant next urges that it was prejudicial error on the part of the trial court to have permitted Lipsky, over defense objections, to testify as to the conduct and statements of appellant's wife, Beverly, of his uncle, Frank Bassi, and of his friends Perez and Bracer on February 10, 1972, at the Bassis' apartment. We agree. Since the conspiracy to

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in the bill which became law. One of the rights listed in the Ervin bill and not in H.R. 2516 was the right to inform on violations of Federal Criminal Law. However, appellant's position might be persuasive if the majority had accepted rather than rejected the Ervin proposal since the Ervin proposal—unlike the majority's—was clearly concerned with federal rights other than Fourteenth Amendment rights. See S. Rep. 721, U.S. Code Cong. & Admin. News, 90th Cong., 2d Sess. 1968, at 1854-61 (1968) (minority views of Senator Ervin). The majority's narrow focus on *racially* motivated interferences with voting or equal use of federal and state facilities (or receipt of benefits) indicates persuasively that the majority, in proposing H.R. 2516, did not intend to preempt or restrict the whole field already covered by 18 U.S.C. §241.

violate Parks' civil rights had terminated with her death, this proof was not admissible as declarations of a co-conspirator made in the course of a conspiracy or as evidence of acts designed to show illegal activity on the part of the conspirators themselves. See *United States* v. *Lutwak*, 344 U.S. 604 (1952); *United States* v. *Costello*, 352 F.2d 848 (2d Cir. 1965), *vacated on other grounds*, 390 U.S. 201 (1968). The purpose of the evidence was to get before the jury the fact that various persons other than Lipsky, who had been closely associated with Pacelli, believed Pacelli to be guilty of having murdered Parks. Indeed the government frankly conceded this in its brief:

> "The fact that Pacelli's wife summoned Lipsky to the Bassis' apartment is proof that she knew of his involvement with Pacelli in the murder. The fact that Pacelli's wife, uncle, and close friends were discussing at that meeting that the murder had been bungled by leaving the body where it could easily be found—rather than that Pacelli had been remanded for something he had not done—is strongly indicative that they knew that Pacelli caused Patsy Parks's death. . . . [T]he jury was entitled to conclude, from the close relationship to Pacelli of the persons at the February 10th meeting, that the source of their knowledge was Pacelli himself, since he was the only person besides Lipsky present at the commission of the crime.
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> "The additional fact that at this meeting Pacelli's wife told Lipsky to get instructions from Bracer, who, with Perez, then told Lipsky he should go to Florida and offered him the money to do so, was clearly evidence that they knew that Lipsky had seen Pacelli kill Parks." [5]

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5 Government's Brief, p. 13.

Since the extra-judicial statements clearly implied knowledge and belief on the part of third person declarants not available for cross-examination as to the source of their knowledge regarding the ultimate fact in issue, i.e., whether Pacelli killed Parks, Lipsky's testimony as to them was excludable hearsay evidence. *Krulewitch* v. *United States*, 336 U.S. 440 (1949); 2 J. Wigmore, Evidence §267 (3d ed. 1940).

In the *Krulewitch* case a defendant was prosecuted for inducing a woman — the complaining witness — to cross state lines for the purpose of prostitution. The complaining witness was permitted to testify at trial that several weeks after the crime had been committed defendant's co-conspirator told her not to talk and suggested that they (defendant's co-conspirator and the complaining witness) take the blame rather than defendant since defendant "couldn't stand it."[6] The Supreme Court held that permitting the testimony was reversible error since it introduced an extra-judicial statement which "plainly implied that petitioner was guilty of the crime for which he was on trial." The Court stated:

> "The statement plainly implied that petitioner was guilty of the crime for which he was on trial. It was made in petitioner's absence and the Government made no effort whatever to show that it was made with his authority. The testimony thus stands as an unsworn, out-of-court declaration of petitioner's guilt. This hearsay declaration, attributed to a co-conspira-

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6 The complaining witness' testimony as to her conversation with the co-conspirator went as follows:

> "She asked me, she says, 'You didn't talk yet?' And I says, 'No.' And she says, 'Well, don't,' she says, 'until we get you a lawyer.' And then she says, 'Be very careful what you say.' And I can't put it in exact words. But she said, 'It would be better for us two girls to take the blame than Kay (the defendant) because he couldn't stand it, he couldn't stand to take it.'"

tor, was not made pursuant to and in furtherance of objectives of the conspiracy charged in the indictment, because if made, it was after those objectives either had failed or had been achieved." 336 U.S. at 442.

The admission of testimony as to the third party's declarations in the present case violated the central purpose of the hearsay rule, which is to give litigants "an opportunity to cross-examine the persons on whom the fact finder is asked to rely." Finman, *Implied Assertions as Hearsay: Some Criticisms of the Uniform Rules of Evidence,* 14 Stan. L. Rev. 682, 684 (1962). We cannot agree that the only source of the extra-judicial declarations and conduct could have been Pacelli himself. Cross-examination of the declarants, had they been produced as witnesses, might have established that the information came from Lipsky himself, from third persons, or from news media, especially since appellant had on the same day been jailed as a result of the discovery of Parks' body.

We consider it irrelevant, under *Krulewitch,* that the extra-judicial statements and conduct admitted in this case may not have been intended by those involved to communicate their belief that Pacelli murdered Parks. The government concedes that if Lipsky had testified that the various declarants (Beverly Jalaba, the Bassis, Perez and Bracer) had told him at the February 10th meeting that Pacelli had admitted to them his participation in the killing of Parks, the testimony would have been inadmissible hearsay. While the danger of insincerity may be reduced where implied rather than express assertions of the third parties are involved, see Falknor, *Silence as Hearsay,* 48 U. Pa. L. Rev. 192, 194-95 (1940), there is the added danger of misinterpretation of the declarant's belief. Moreover, the declarant's opportunity and capacity for accurate perception or his sources of information re-

main of crucial importance. See Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 215 (1948). Here, for instance, there is no suggestion that the declarants actually observed Pacelli commit the crimes with which he was charged. Thus their extra-judicial implied assertions have even less indicia of reliability than the implied assertion involved in *Krulewitch*, which was held inadmissible. Pacelli was entitled to cross-examine the third party declarants in order to test the validity of the inference—which the government sought to have the jury draw—that he had told the declarants he had killed Parks. See Finman, *supra*, at 689 n.20.

As in *Krulewitch* the government in this case made "no effort whatever" to show that the extra-judicial statements of Pacelli's wife, uncle and "friends" were made with his authority. Generally there must be some evidence of an agency before an alleged agent's declarations can be received as admissions. *United States* v. *Coppola*, 479 F.2d 1153 (10th Cir. 1973); 4 J. Wigmore, *Evidence* §1078 (Chadbourn rev. 1972). Nor is this a case where an agency might be inferred from the surrounding circumstances.[7] See 2 J. Wigmore, *Evidence* §280(2) (3d ed. 1940). Two of the four alleged declarants (Perez and Bracer) were not even related to appellant, and it is far from obvious that the statements attributed to appellant's wife were instigated by appellant.

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7 *DiCarlo* v. *United States*, 6 F.2d 364 (2d Cir.), *cert. denied*, 268 U.S. 706 (1925), where a witness was permitted to testify that the defendant's wife asked him to secrete certain revolvers, is inapplicable here. In *DiCarlo* there was no hearsay objection to the witness' testimony. The point raised at trial and argued on appeal was that the government had failed to make any showing that the revolvers were connected with the shooting alleged in the indictment. Furthermore in *DiCarlo* the circumstances provided a strong basis for an inference of agency. This does not exist in the present case.

Lipsky's testimony regarding the declarations of the third parties in the present case cannot be dismissed as harmless error. Without his testimony the government had no case. It relied upon him as the only eye-witness (other than Pacelli) of the murder of Parks. His credibility was of crucial importance and there were ample grounds for attacking it. He had been convicted of conspiracy to transport stolen securities. He had committed perjury on several different occasions. Indeed a prior conviction of Pacelli on a narcotics charge, which had resulted from Lipsky's testimony, had been set aside and a mistrial declared in still another narcotics charge against Pacelli when it appeared that Lipsky had lied under oath, testifying that he had not received any consideration from the prosecutor when in fact he had been given immunity as to any matter concerning which he provided evidence against Pacelli. Lipsky, furthermore, had been a user of cocaine, with a history of psychiatric disturbances. After having been indicted for the Parks murder by the State of New York in Nassau County, he had on January 15, 1973, been permitted to plead guilty to the reduced charge of manslaughter, at which time the state court judge was furnished with a letter from the United States Attorney for the Southern District of New York attesting to Lipsky's cooperation in federal narcotics investigations and his anticipated testimony against Pacelli in the present case.

Although the government at oral argument pointed to other evidence as corroboratory of Lipsky's testimony, most of this proof was consistent with the defense theory that Lipsky himself had killed Parks and was now attempting to implicate Pacelli as the killer in an effort to obtain leniency for himself. Evidence that the rented car used on the night of the murder was later burned, that traces of blood were discovered in it, and that a knife

was recovered from the spot where Lipsky swore that it had been thrown did not, without Lipsky's testimony, tend to establish that Pacelli rather than Lipsky was the killer. Furthermore the traces of blood in the car and on the coat which Lipsky testified as being similar to that worn by Pacelli on the night of the murder were too minute to permit investigators to determine whether they were human blood and, if so, how old.

Against this background the conduct and extra-judicial declarations attributed to the third persons in the Bassis' apartment, which the prosecutor used in summation, assumed a more important corroboratory role than might otherwise have been the case since, in the government's words, they were "strongly indicative that they [the third party declarants] knew that Pacelli caused Patsy Parks's death" and "that they knew that Lipsky had seen Pacelli kill Parks" (Govt's Brief p. 13).

Failure to Disclose Jencks Act Statements

Pacelli contends that he was denied a fair trial by reason of the government's failure to furnish him with certain material to which he claims he was entitled under the Jencks Act, 18 U.S.C. §3500, for cross-examination of Lipsky. Although the government did furnish to Pacelli's counsel two statements made by Lipsky regarding the Parks murder and his grand jury testimony on that subject, it did not turn over (1) his letter of December 22, 1972, to Mr. Morvillo stating that he was in "a terrible mental state," apologizing for his "foul-up" of the earlier narcotic trial against Pacelli because of his having perjured himself, and expressing eagerness to testify for the government against Pacelli, and (2) various statements by Lipsky to law enforcement officers regarding his involvement with Pacelli in the narcotics business. Appellant argues that the failure to do so impaired his cross-examination.

Under the Jencks Act a defendant in a federal criminal trial is entitled, after a government witness has testified on direct examination, to receive for purposes of cross-examination any "statement" of the witness in the government's possession "which relates to the subject matter as to which the witness has testified." 18 U.S.C. §3500(b) (1970). We have held that the statement must at least "relate generally to the events and activities testified to" before the statement must be produced, *United States* v. *Cardillo*, 316 F.2d 606, 615 (2d Cir.), *cert. denied*, 375 U.S. 822 (1963), and that the defense is not entitled to statements which are merely "incidental or collateral." *United States* v. *Birnbaum*, 337 F.2d 490 (1964). On the other hand, where the government's representations as to relevancy are challenged, the better practice is for it to make the disputed statement available to the trial judge for an *in camera* inspection and ruling, which will normally be upheld in the absence of a showing of abuse of discretion, see, e.g., *United States* v. *Covello*, 410 F.2d 536 (2d Cir. 1969), *cert. denied*, 396 U.S. 879, *rehearing denied*, 397 U.S. 929 (1970), rather than risk reversal of a conviction because it played its cards too close to the vest. See *United States* v. *Borelli*, 336 F.2d 376, 393 (2d Cir.), *cert. denied*, 379 U.S. 960 (1964).

In this case, after Lipsky had testified on direct examination, appellant's trial counsel asked to be given whatever reports the government had concerning Lipsky's conversations with federal narcotics agents which led to the three indictments (72 Cr. 664, 72 Cr. 1319, and 73 Cr. 441) of Pacelli for dealing in narcotics. The government refused to furnish these reports on the grounds that the conversations did not relate to the present case against Pacelli for killing Parks. It also unintentionally failed to disclose the existence of Lipsky's letter to Morvillo, its inadvertence being attributed to the fact that with "many prosecutions

involving Pacelli" there was a "breakdown in channels of communication" between the different prosecutors handling the different cases. In support of its position the government points to the fact that the Assistant United States Attorney who tried this case also tried a subsequent narcotics case, *United States* v. *Sperling*, et al., 73 Cr. 441, in which Pacelli was again a defendant and Lipsky a witness, where the Assistant disclosed the letter as soon as it was shown to him. After a fresh review of Lipsky's narcotics statements the United States Attorney also forthrightly disclosed upon oral argument that the government had discovered "three short paragraphs" in two of the statements which should have been disclosed but, again due to oversight, had not been produced and turned over to appellant's trial counsel.[8]

Accepting the government's assertion that these nondisclosures were inadvertent, we cannot agree with its characterization of them as "harmless error." Although appellant's counsel possessed an abundance of impeaching material which he exploited at trial, none of this information conveyed quite so forcefully as Lipsky's letter to Morvillo the desperate state of Lipsky's mind after he had caused a mistrial by perjuring himself in the previous narcotics prosecution against Pacelli. The letter, furthermore, contains a blatant lie to the effect that his perjury, which caused the mistrial, had been unintentional rather

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8 Upon oral argument the government stated that the Assistant U.S. Attorney who tried the case had reviewed the statement *before trial* but "simply overlooked the three paragraphs . . . and never again in getting ready for trial and putting the case before the jury had occasion to go back to those statements." However, the record discloses that the narcotics statements were repeatedly "flagged" by defense counsel, *United States* v. *Miller*, 411 F.2d 825 (2d Cir. 1969), and that the Assistant specifically represented to the trial court during trial and in response to particular inquiries by defense counsel that he would recheck the narcotics statements.

than deliberate.[9] Appellant's counsel would probably have sought to make this letter the "capstone" of his attack on Lipsky's credibility, cf. *United States* v. *Miller, supra,* and argued that it revealed a frantic—even mentally disturbed —person who was ready to tell any lie to anyone in order to save himself from a murder conviction in the state court.[10] Denial of the opportunity to use such forceful impeaching material bearing on the credibility of the government's key witness mandates a new trial.[11]

Our comments with respect to the government's failure to disclose Lipsky's letter do not apply to its refusal to furnish his narcotics statements. From our examination of the samples of these statements which were handed up to this court upon oral argument we are satisfied that if these samples are representative, the contents did not relate to the subject matter of Lipsky's direct examination except for the three excerpts which the government concedes that it inadvertently failed to disclose.[12] The mere

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9 In his letter, Lipsky represented to Morvillo that he committed perjury in the prior case because he was "confused" by defense counsel's questions concerning promises by the prosecutor's office. Later, in the *Sperling* trial, under cross-examination based on the Morvillo letter, Lipsky admitted that his prior perjury was not caused by any confusion.

10 The letter was dated December 22, 1972. The murder charge was not reduced to manslaughter until January 15, 1973.

11 Since argument of the appeal the United States Attorney has, with characteristic forthrightness, turned over another letter written by Lipsky, this time on December 6, 1972, to Assistant United States Attorney Gerald A. Feffer, which recently came to light in the trial of another case. Since it contains additional material that could have been useful to the defense in cross-examination of Lipsky, it serves to reinforce the conclusion already reached by us with respect to Lipsky's December 22, 1972, letter to Mr. Morvillo.

12 Standing alone the failure to disclose the three excerpts would be harmless error.

fact that Lipsky had referred generally in his direct testimony to his employment by Pacelli in the narcotics business did not entitle his counsel to explore his earlier detailed statements on that matter, which was strictly collateral to the subject of his testimony, i.e., the circumstances surrounding the Parks murder. See *United States* v. *Cardillo, supra.*

Trial Court's Rulings with Respect to Cross-Examination and Prosecutor's Remarks in Summation

Since the case must be remanded we find it advisable to consider the other issues raised by Pacelli's counsel in order to minimize such doubt or possible error as may otherwise be encountered upon a retrial.

The able and experienced trial judge acted well within his discretion in restricting certain attempted cross-examination of Lipsky. The subjects which defense counsel sought to explore had either been adequately covered (e.g., Lipsky's prior perjury, his testimony that he had been struck by Nassau County police when interrogated, his relationship with Pacelli in the narcotics business) or were of extremely tenuous relevancy (the prosecutor's discussions with Lipsky regarding his prior perjury). These are areas best left to the discretion of the trial judge, who usually is best able to determine the relevancy of proffered examination on the basis of his day-to-day following of the evidence as it unfolds. See *Smith* v. *Illinois*, 390 U.S. 129, 132 (1968); *United States* v. *Mahler*, 363 F.2d 673, 678 (2d Cir. 1966); *United States* v. *Bowe*, 360 F.2d 1, 14 (2d Cir. 1966).

Similarly, the cross-examination of Pacelli as to whether he had said that if anybody should ever double-cross him

he would "shoot their kneecaps off," while presenting a closer question, may well have been justified as evidence of a generic threat bearing on the issue of intent to prevent Parks from testifying against him, see I Wigmore §102 (3d ed. 1940); *United States* v. *Anunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961), provided the government had "support for the question," cf. *United States* v. *Haskell*, 327 F.2d 281, 284 (2d Cir.), *cert. denied*, 377 U.S. 945 (1944), which it represents that it did.

The prosecutor's comments on summation were well within the bounds of propriety. Pacelli's contention that he was denied a fair trial by reason of disparaging remarks of the trial judge is not only frivolous but misleading, being based on remarks lifted out of context by his counsel on this appeal, a practice which departs from ethical standards expected of such counsel. Such mild reprimands of trial counsel as were delivered by the trial judge appear from the record, when read in context, to have been fully justified.

The judgment of conviction is reversed and the case is remanded for a new trial.

MOORE, *Circuit Judge* (dissenting):

I dissent and would affirm the judgment of conviction.

The key witness for the government was Lipsky. As so frequently is the case, particularly when the crime is murder, narcotics dealing or bank robbery, the government's witnesses are not outstanding members of the community noted for their morality and rectitude. The jury is invariably instructed, as it was here, that, in the light of all the facts brought out on examination and cross-examina-

tion, they may accept or reject any or all of the witnesses' testimony. The opportunity to see the witness, hear his testimony and appraise its worth is fundamental to our system of criminal justice.

There were only two persons present at the scene of Parks' murder, Pacelli and Lipsky. Lipsky recited his version of what he saw and heard. Many reasons for disbelief were advanced, amongst which were the facts that Lipsky was a perjurer and Lipsky had been promised immunity and lenient treatment. Such a man might well be disbelieved by a jury, and for good cause. However, this jury believed him.

Of course, error can be found if the jury was influenced by improper testimony but any judge experienced in reviewing jury trials knows that every violation of text book rules of evidence does not and should not constitute reversible error. Although a doctrine of "harmless error" has been evolved by appellate courts, this is but a catchphrase for an ultimate conclusion of fact by the reviewing court. Translated into realistic terms, it means not that the appellate court knows with any degree of certainty what piece or pieces of evidence influenced any particular juror and in what way; but rather, on balance, was the evidence so strong for conviction that the appellate court is willing to substitute itself for the jury and decide that the "harmless error" evidence placed before the jury would not—or better, should not—have changed the result. In my opinion, the decision here should be made upon this theory which, in turn, calls for an analysis of the specific facts allegedly erroneously admitted.

As stated, the murder scene on February 4, 1972, was luridly described and Pacelli's role therein presented by Lipsky. The method of the murder, the blood in the car, the blood on the coat, Pacelli's statement to Lipsky on

February 5th of satisfaction at having killed Parks, were all properly before the jury. If the jury believed Lipsky (and it apparently did), nothing more was required.

Turning now to the "hearsay" constituting, according to the majority, reversible error, of what does this hearsay, so damaging as to require reversal, consist? On February 10th at the apartment of Frank Bassi (Pacelli's uncle) were gathered, Bassi, Pacelli's wife, Beverly, Beverly's sister, Barbara, Pacelli's sister, Loretta, three friends, Al Bracer, Abby Perez and Barbara Jalaba, and a man named Bayron. By this time via the public press, Parks' murder and the burning of the body had been revealed to the public at large. Frank Bassi commented about the bungling technique used in trying to dispose of the body. Lipsky was induced to go away for a while and given $1,000 by Perez for that purpose. From this the majority conclude that these "extra-judicial statements clearly implied knowledge and belief on the part of third person declarants not available for cross-examination as to the source of their knowledge regarding the ultimate fact in issue, i.e., whether Pacelli killed Parks." However, there was no declaration that Pacelli had told them that he had killed Parks and none expressed an opinion to this effect so that any such "hearsay" problem is not before us. Thus, Lipsky's statements of the February 10th apartment conversation added so little—and this only by way of inference—to his actual eye-witness testimony as to the events on February 4th that it does not, in my opinion, fall within the category of reversible error.

Turning to the alleged Jencks Act violation, there is no doubt that the Lipsky-Morvillo letter revealed that Lipsky wished to go to extremes to obtain favorable prosecution and court consideration. However, this field had been adequately covered on cross-examination and the jury was

well aware of the circumstances under which the testimony was given. Thus this letter did not contain the crucial ammunition for cross-examination that the appellant would have us believe.

With the majority's conclusion and discussion of Section 241 I am in accord.

For the above reasons, I would affirm.